

**WORKFORCE DEVELOPMENT DEPARTMENT[871]**

**Adopted and Filed**

Pursuant to the authority of Iowa Code section 96.11, the Director of Workforce Development hereby amends Chapter 26, “Contested Case Proceedings,” Iowa Administrative Code.

These amendments update, clarify and simplify the procedures in preparing for and participating in unemployment appeal hearings.

Notice of Intended Action was published on November 23, 2016, as **ARC 2823C**. No comments were received. The rules were on the agenda for the Administrative Rules Review Committee meeting on December 13, 2016, and no questions or comments were received during this meeting. These amendments are identical to those published under Notice.

This rule making does not have a fiscal impact on the state of Iowa.

Waiver provisions pursuant to Iowa Code section 17A.4(2) are not applicable.

After analysis and review of this rule making, no impact on jobs has been found.

These amendments are intended to implement Iowa Code chapter 96.

These amendments will become effective May 3, 2017.

The following amendments are adopted.

ITEM 1. Amend subrule 26.3(1) as follows:

**26.3(1)** Time shall be computed as provided in Iowa Code section ~~4.1(22)~~ 4.1(34).

ITEM 2. Amend rule 871—26.6(17A,96) as follows:

**871—26.6(17A,96) Notice of hearing.**

**26.6(1)** ~~A telephone or in-person hearing shall not be scheduled before the seventh calendar day after the parties receive notice of the hearing. Notice~~ A notice of hearing shall be sent by first-class mail or via e-mail to all parties at their last-known address at least ten calendar days in advance of the hearing date and shall include:

*a.* The date, time and place of an in-person hearing, or the date and time of a telephone hearing, including instructions for calling the appeals bureau in advance of the hearing to provide the names and telephone numbers of all participants and witnesses; and

*b.* The nature of the hearing, including the legal authority and jurisdiction under which the hearing is held; and

*c.* A statement of the issues and the applicable sections of the Iowa Code or Iowa Administrative Code; and

*d.* A description of the administrative law judge who will serve as presiding officer.

**26.6(2)** ~~The seven-day~~ ten-day notice of hearing may be waived upon the agreement of the parties.

**26.6(3)** No change.

**26.6(4)** A hearing shall be scheduled promptly and shall be conducted by telephone unless a party requests that it be held in person. A request for an in-person hearing may be denied if factors such as the distance between the parties, the number of parties or the health of any party ~~makes~~ make it impractical or impossible to conduct a fair hearing in person. An in-person hearing may be scheduled at the discretion of the presiding officer to whom the contested case is assigned or, ~~in that presiding officer’s absence,~~ the by the manager or chief administrative law judge of the appeals bureau. The party requesting an in-person hearing will ordinarily be required to travel the greater distance if all parties are not located near the same hearing site. As a matter of discretion, the appeals bureau may schedule an in-person hearing at a regular hearing site approximately equidistant from the parties. In the discretion of the presiding officer to whom the contested case is assigned, or the manager or chief administrative law judge of the appeals bureau, witnesses or representatives may be allowed to participate via telephone in an in-person hearing, ~~provided that each party has at least one witness present at the hearing site. When two or more parties are involved, the evidence shall be presented during the same hearing.~~

**26.6(5) to 26.6(8)** No change.

ITEM 3. Amend rule 871—26.8(17A,96) as follows:

**871—26.8(17A,96) Withdrawals, dismissals, and postponements.**

**26.8(1)** An appeal may be withdrawn at any time prior to the issuance of a decision upon the request of the appellant and with the approval of ~~the presiding officer to whom the case is assigned~~ an administrative law judge or the manager or chief administrative law judge of the appeals bureau. Requests for withdrawal may be made in writing or orally, provided the oral request is tape-recorded by the presiding officer.

An appeal may be dismissed upon the request of a party or in the agency's discretion when the issue or issues on appeal have been resolved in the appellant's favor.

**26.8(2)** No change.

**26.8(3)** If, ~~due to emergency or other~~ for good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.

"Good cause" for purposes of this rule is defined as an emergency circumstance that is beyond the control of the party and that prevents the party from being able to participate in the hearing. Examples of good cause include, but are not limited to, death, sudden illness, or accident involving the party or the party's immediate family (spouse, partner, children, parents, sibling) or other circumstances evidencing an emergency situation which was beyond the party's control and was not reasonably foreseeable. Examples of circumstances that do not constitute good cause include, but are not limited to, a lost or misplaced notice of hearing, confusion as to the date and time for the hearing, failure to follow the directions on the notice of hearing, oversleeping, or other acts demonstrating a lack of due care by the party.

**26.8(4)** A request to reopen a record or vacate a decision ~~may be heard ex parte by the presiding officer~~ must be made in writing. If necessary, the presiding officer may hear, ex parte, additional information regarding the request for reopening. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.

**26.8(5)** No change.

ITEM 4. Amend rule 871—26.10(17A,96) as follows:

**871—26.10(17A,96) Ex parte communications.**

**26.10(1) to 26.10(7)** No change.

**26.10(8)** The presiding officer may impose appropriate sanctions for violations of this rule, including dismissal of an appellant's contested case, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by agency personnel shall be reported to the manager or chief administrative law judge of the appeals bureau for possible sanctions.

ITEM 5. Amend rule 871—26.13(17A,96) as follows:

**871—26.13(17A,96) Subpoenas and witnesses.**

**26.13(1) and 26.13(2)** No change.

**26.13(3)** The written request shall include:

*a.* The name and address of the person to be served; and

b. A statement of the relevance of the witness's testimony and that it will not repeat or duplicate the testimony of other witnesses; ~~and.~~

c. ~~A statement that the witness refuses to testify voluntarily despite the party's request that the person do so.~~

**26.13(4)** No change.

**26.13(5)** Documents subpoenaed for telephone hearings shall be mailed, or faxed, or e-mailed to the appeals section bureau and to the other parties to the proceeding prior to the hearing to facilitate the exchange of documents among the parties. Documents subpoenaed for in-person hearings shall be brought to the hearing site at the time of the contested case hearing, unless otherwise ordered by the presiding officer.

**26.13(6) to 26.13(10)** No change.

ITEM 6. Amend rule 871—26.14(17A,96) as follows:

**871—26.14(17A,96) Conduct of hearings.**

**26.14(1) to 26.14(5)** No change.

**26.14(6)** ~~In the event that~~ If one or more parties which have received notice for a contested case hearing fail to appear at the time and place of an in-person hearing, the presiding officer may proceed with the hearing. If the appealing party fails to appear, the presiding officer may decide the party is in default and dismiss the appeal. The hearing may be reopened if the absent party makes a request in writing to reopen the hearing under subrule 26.8(3) and shows good cause for reopening the hearing.

a. If an absent party arrives for an in-person hearing while the hearing is in session, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If an absent party arrives for an in-person hearing after the record has been closed and after any party which had participated in the hearing has departed, the presiding officer shall not take the evidence of the late party. ~~Instead, the presiding officer shall inquire ex parte as to the reason the party was late. For good cause shown, the presiding officer shall cause notice of hearing to be issued to all parties of record and reopen the record. The record shall not be reopened if the presiding officer does not find a good cause for the party's late arrival.~~

**26.14(7)** If a party has not responded to a notice of telephone hearing by providing the appeals bureau with the names and telephone numbers of the persons who are participating in the hearing by the scheduled starting time of the hearing or is not available at the telephone number provided, the presiding officer may proceed with the hearing. If the appealing party fails to provide a telephone number or is unavailable for the hearing, the presiding officer may decide the appealing party is in default and dismiss the appeal as provided in Iowa Code section 17A.12(3). The record may be reopened if the absent party makes a request in writing to reopen the hearing under subrule 26.8(3) and shows good cause for reopening the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. ~~Instead, the presiding officer shall inquire ex parte as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.~~

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

**26.14(8) to 26.14(10)** No change.

**26.14(11)** In the discretion of the presiding officer, witnesses may be excluded from the hearing room or telephone hearing until called to testify. The presiding officer shall admonish such witnesses

not to discuss the case among themselves until after the record has been closed. All witnesses shall be subject to examination by the presiding officer and by all parties.

**26.14(12)** and **26.14(13)** No change.

ITEM 7. Adopt the following **new** subrule 26.15(5):

**26.15(5)** Proposed exhibits should be sent to the appeals bureau and to the party or parties to the proceeding prior to the hearing by mail, fax, or e-mail.

ITEM 8. Amend subrule 26.17(1) as follows:

**26.17(1)** The presiding officer shall issue a written, signed decision as soon as practicable after the closing of the record in a contested case. Each decision shall:

*a.* Set forth the issues, appeal rights, a concise history of the case, findings of essential facts, the reasons for the decision and the actual disposition of the case;

*b.* Be based on the kind and quality of evidence upon which reasonably prudent persons customarily rely for the conduct of their serious affairs, even if none of such evidence would be admissible in a jury trial in the Iowa district court; and

*c.* Be sent by first-class mail or e-mail to each of the parties in interest and their representatives.

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EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/29/17.